IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. _____

CHARLES ZEMLIAK,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of California entered in the above-entitled case on January 19, 1972.

JURISDICTION AND STATEMENT

This Court has jurisdiction under Title 28, Sec. 1257, U.S.C.

On November 7, 1968, petitioner pleaded guilty in the Los Angeles Superior Court to a charge of grand theft, in violation of California Penal Code Section 487.1 (based on the acceptance of money for investment purposes).

In May, 1969, petitioner's motion to withdraw his guilty plea was heard and denied by the court (C. T. 6-45). Said motion was based on petitioner's contentions that (1) the plea was entered in reliance upon promises as to probation made to him on behalf of the district attorney, and those promises had been breached; (2) the plea was entered as a result of petitioner's "mistake, ignorance, or inadvertence" as to probation, the facts, the factual basis and essential elements of the charge and the defenses thereto, as well as proof requirements; (3 the plea had been entered because of reliance upon inadequate counsel; and (4) the plea was entered without a proper inquiry by the court as to whether petitioner was making the plea knowledgeably and voluntarily.

Petitioner, during the Probation and Sentencing Hearing in June, 1969, unsuccessfully renewed his aforementioned motion (C. T. 55; R. T. 636-687). Thereafter, probation was denied, a judgment of conviction was entered, and petitioner was sentenced to state prison for the term prescribed by law. Petitioner duly appealed from the judgment to the California Court of Appeal (C. T. 56-59).

The Court of Appeal affirmed the judgment on November 24, 1971. A copy of that

court's opinion is attached as Appendix "A" hereof. Petition for rehearing to the Court of Appeal was denied. Petition for Hearing to the California Supreme Court was denied on January 19, 1972. See Appendix "B", attached hereto. 1/

Representations As to Probation

Petitioner's sworn statement in support of the aforementioned motion alleged that (C. T. 8, 9)

> ". . . his attorney (trial counsel P. Basil Lambros) informed him that if he would plead guilty to Count I, that the District Attorney's office would be neutral on the issue of probation and the investigation would not be continued; had he known that the District Attorney, in breach of his agreement, intended to pursue the investigation and transmit the results thereof to the Probation Department with the consequence that his chances of obtaining probation would be considerably lessened, he would not have pled guilty; that

1/ Mr. Justice Douglas granted an extension of time to June 17, 1972 to file this Petition for Certiorari. See discussion hereinafter.

said office did pursue the investigation and submit reports based thereon to the Probation Department."

Petitioner's trial counsel (P. Basil Lambros) in a sworn statement in support of the motion to withdraw his plea, stated that the District Attorney's office had stated that it would neither recommend nor oppose probation, but that if the probation officer requested the reports that the District Attorney had already gathered, the same would be transmitted to the Probation Department; that he (Lambros) was under the impression from his discussions with the District Attorney's office that a plea of guilty would result in a discontinuance of the investigation which, in turn, would result in probation; that he consequently communicated assurances to petitioner that if he entered a plea of guilty the investigation would terminate. The District Attorney's office (in papers submitted in opposition to the motion) admitted that counsel had asked whether that office "would be neutral in the matter of probation," and that the office replied that it would not "make any comments to the probation officer regarding any aspects of the case to sway the Probation Department or to help them make any decision in this particular matter at any time" (C. T. 36, 37). Nevertheless (petitioner alleged in the said motion) the District Attorney's office breached that understanding, pursued the investigation and transmitted the reports thereof to the Probation Department. Moreover, after this breach, which was the subject of the original motion, the District Attorney's office committed

a more flagrant breach at the subsequent Probation and Sentencing Hearing, when that office expressly stated to the Court that the "People request that probation be denied and that the defendant be sentenced to the State Prison" (R. T. 686, lines 21-22). The Deputy District Attorney's claim that he had indicated to Appellant's trial counsel that at the time of sentencing he "would make comments to the court indicating that this was a 'state prison' type case" [emphasis supplied] (C. T. 37) is not the equivalent of a specific, express request for a denial of probation, and sentence to the state prison; nor is it a warning that such a request might be made.

On or about February 10, 1972, petitioner filed with this Court an Application For Bail and Stay Pending Filing of Petition for Certiorari. Said application, numbered A-833, was informally denied. On February 18, 1972, said motion was orally renewed and petitioner informed this Court by telegram of newly obtained admissions on the part of George Rhodes, the former prosecutor in the case. On February 22, 1972, Mr. Rhodes telegraphed this Court certifying to the accuracy of petitioner's said telegram, and on February 25, Mr. Rhodes executed a sworn statement which was transmitted to this Court reaffirming the accuracy of said telegrams and expressly admitting his breach of his promises to stay neutral on the issue of probation and neither oppose nor recommend same and to discontinue the investigation (he admitted also in said statement that he ordered a full report and transmitted the

the results of the amplified investigation to the Probation Department). In a Declaration dated February 28, 1972, and submitted to this Court, Rhodes stated that an investigator for the District Attorney "without my knowledge did continue his investigation and include the findings of such investigation in his report to the probation department." Said telegrams and declarations are on file in this Court in case numbered A-833.

Justice William O. Douglas of this Court issued an order (case numbered A-833) on March 3, 1972, stating that:

> "It appears that, subsequent to the denial of the application for bail, facts have come to light suggesting that petitioner may have a substantial claim under this Court's recent decision in Santobello v. New York, 404 U.S. 257. These facts are disputed, however, and have not been considered in any lower court which has previously ruled on this cause. Therefore, since the substantiality of the petitioner's application appears to depend upon an evidentiary inquiry, more appropriately undertaken by another tribunal, the reapplication for bail is denied."

On April 14, 1972, Mr. Justice Douglas signed an order extending the time to file a petition for Writ of Certiorari in this Court to June 17, 1972 (case number A-1072).

On or about March 13, 1972, petitioner filed a habeas corpus proceeding in the California Court of Appeal, Second Appellate District (2nd CRIM 21495) praying for, among other relief, an evidentiary hearing in accordance with the suggestion of Justice Douglas. That Court on March 15, 1972, ordered that the prosecution show cause in the Los Angeles Superior Court why a writ of habeas corpus should not issue as prayed in said petition. A copy of said order is attached as Appendix "C". After a hearing at the Los Angeles Superior Court on April 27, 1972, the court discharged said order to show cause and denied petitioner the relief sought in said habeas corpus proceeding.

On May 8, 1972, petitioner duly filed a notice of appeal from the said April 27, 1972 ruling of the Los Angeles Superior Court to the California Court of Appeal. Said appeal is now pending in that court.

This Court, in Santobello v. New York, 404 U.S. 257, decided on December 20, 1971, after the filing of the Opinion of the California Court of Appeal herein, vacated, on federal constitutional grounds, a state criminal conviction based on a guilty plea where a promise "that there would be no sentence recommendation by the prosecution" was breached and the prosecutor "recommended the maximum one-year sentence." Santobello, supra, it is submitted, is indistinguishable from the case at bench and mandates, on federal constitutional grounds, reversal of the judgment of conviction herein. (See concurring opinion, Mr. Justice Douglas.)

In the case at bench, petitioner's trial counsel's sworn allegation, undenied by respondent, that the district attorney's office stated that it "would neither recommend or oppose probation," is identical to the prosecution promise in Santobello, supra, "that there would be no sentence recommendation by the prosecution."

Petitioner cited and argued the Santobello case to the California Supreme Court in its unsuccessful Petition for Hearing in that Court.

In Commonwealth v. Wilkins, 277 A. 2d 341, 442 Pa. 524 (1971) the Supreme Court of Pennsylvania held that defendant had the right to withdraw his plea where the prosecutor's promise as to sentence recommendation was not kept, although the defendant told the court that no one -- his own attorney, the state's attorney or the judge -- had promised him any specific sentence, and he understood that if he pleaded guilty, he would be sent away for a long time. See also: White v. Gaffney, 435 F. 2d 1241 (10th Cir., 1970) (promise to recommend sentence not kept; plea vacated, although sentencing Court stated it would not be influenced by recommendations and defendant told court his plea was not induced by promises).

Plea Based on Mistake

An additional ground for requiring the setting aside of the plea herein is the fact that it was based on mistake, ignorance or inadvertence

as to probation, the facts, the factual basis and essential elements of the charge, the defenses thereto and proof requirements.

In U.S. v. Pallotta, 433 F.2d 594 (1st Cir., 1970) the Court ordered a hearing when defendant alleged that his counsel told him that in exchange for a guilty plea the prosecutor had promised to recommend a lighter sentence, which promise was not kept. The Court stated that even if no such agreement existed, the voluntariness of the plea "would be seriously in question if it was induced by representations by court-appointed counsel that such an agreement was in effect."

In State v. Loyd, 190 N.W.2d 123 (Minn. 1971) the Minnesota Supreme Court ordered the withdrawl of the guilty plea where defense counsel led defendant to believe that he could withdraw his guilty plea if the agreement with the prosecutor as to sentencing was not approved by the Court. The sentencing Court disregarded the agreement and imposed the maximum sentence; defendant had stated to the Court that he understands that the sentencing Court might not abide by the agreement and that he pleads guilty nevertheless.

Inability Or Failure of Counsel Herein to Investigate the Facts Upon Which the Charge Was Based and Defenses Thereto, and Confer With Client With Regard to Facts, Essential Elements of the Crime and Defenses Thereto, As Well As Proof Requirements Thereof, Constitutes Further Grounds for Requiring the Vacating of the Plea Herein.

Petitioner's trial counsel had insufficient time, and failed, to make any inquiry into the facts or the factual bases of the charge or of the defenses thereto. Indeed counsel was unaware of the facts (R. T. 647; C. T. 19-22). The record reveals no evidence that counsel, nor anybody else, conferred with, or advised petitioner relative to the facts or the necessary elements of the charge herein (or the proof requirements), or the defenses thereto. See, e.g., petitioner's (appellant's) Opening Brief 2/ to the California Court of Appeal, pp. 3-20; counsel was handed, minutes before court appearance time, the felony complaint, and defendant, "upon quickly reviewing same, agreed to plead guilty to the first Count thereof." There is nothing in any of the statements by the People which contradicts the sworn claim that petitioner's consultation with counsel herein, at least as to the count to which the plea was entered (Firestone's $10,000.00 of January 4, 1966), lasted only a few minutes (C. T. 19; R. T. 647).

2/ Lodged herewith as Appendix "D".

In Colson v. Smith, 438 F. 2d 1075, 1081 (5th Cir., 1971) the Court invalidated a guilty plea where there "was no evidence that counsel's advise to plead guilty was based on any evaluation of petitioner's chances had he gone to trial."

Other examples of reversals include:

Abraham v. State, 228 Ind. 179, 91 N. E. 2d 358 (1950), twenty-minute conference; Jones v. Cunningham, 297 F. 2d 851 (4th Cir. 1962) (guilty plea after superficial investigation); State ex rel. Denning v. Rigg, 251 Minn. 120, 86 N. W. 2d 723 (1957) (guilty plea after ten-minute consultation with attorney).

> "One of the most important reasons for requiring counsel is to protect the defendant from pleading guilty to a charge which the evidence does not establish" (State v. Richardson, 194 Kan. 471, 399 P. 2d 799, 815 (1965).

The Court Did Not Determine, When Accepting the Plea, Whether the Plea Was Voluntarily and Knowingly Made (Whether Appellant Understood the Law in Relation to the Facts, the Factual Basis and Essential Elements of the Charge Or the Defenses Thereto).

The trial court, at the time of the plea, failed to determine whether or not Petitioner understood the law in relation to the facts, i. e., the factual basis and essential elements of the charge or the defenses thereto (so that he could determine whether his conduct fell within the charge).

Whether or not Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 is retroactive, the principles propounded therein should be controlling inasmuch as the charge herein involves complicated commercial and economic facts, as well as issues of proper bookkeeping and Petitioner's involvement therein and comprehension thereof. The charge has specific substantive elements as set forth in the Opening Brief (pp. 39-47) as well as proof requirements. When added to the above is ignorance or mistake of the basic facts (caused by ineffective counsel), substance is afforded to Petitioner's claim that he was induced to plead guilty not only without an understanding of the nature of the charge but, in the words of McCarthy v. U.S., 394 U.S. 459,

"without realizing that his conduct does not actually fall within the charge."

CONCLUSION

The judgment of conviction herein, obtained in contravention of constitutional principles, as set forth hereinabove, should be reviewed by this court and reversed.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ELIOT B. FELDMAN
MELVIN W. MILLER

Attorneys for Petitioner

June, 1972

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

Court of Appeal-Second Dist.
FILED
Nov. 24, 1971
Clay Robbins, Jr., Clerk

THE PEOPLE,	)	
	)	
Plaintiff and Respondent	)	
v.	)	
	)	
CHARLES ZEMLIAK,	)	
	)	
Defendant and Appellant	)	2d Cr. No. 17226 S.C. No. A-238384

APPEAL from a judgment of the Superior Court of Los Angeles County. William B. Keene, Judge. Affirmed.

Eliot B. Feldman for Defendant and Appellant.

Evelle J. Younger, Attorney General, William E. James, Assistant Attorney General, and Norman N. Flette, Deputy Attorney General, for Plaintiff and Respondent.

By complaint, defendant was charged in Count I with grand theft (a violation of Pen. Code section 487.1), to which defendant pleaded guilty on November 7, 1968; the other counts charged in the complaint were dismissed on motion of the People. On May 9, 1969, defendant's motion to withdraw his guilty plea was argued by both parties and denied on May 26, 1969 by the court. During defendant's probation and sentencing hearing on June 18, 1969, he renewed his motion to withdraw his guilty plea, and it was again denied, as was his motion to have the matter transferred back to the municipal court. Thereafter, probation was denied, a judgment of conviction was entered, and defendant was sentenced to state prison for the term prescribed by law. Defendant appeals from the judgment.

Defendant's contentions on appeal are that the trial court erred in not allowing him to withdraw his guilty plea because: (1) the plea was entered in reliance upon certain promises made to him on behalf of the district attorney, and those promises had been breached; (2) the plea was entered as a result of defendant's "mistake, ignorance, or inadvertence" as to the nature of the charge; (3) the plea had been entered because of reliance upon inadequate counsel; and (4) the plea was entered without a proper inquiry by the court as to whether defendant was making the plea knowledgeably and voluntarily.

Defendant's first three contentions may be dealt with as a trilogy. We recognize that, if proved, each of defendant's first three contentions would constitute a ground upon which a trial court could properly allow a guilty plea to be

withdrawn. [1] However, in the trial court, defendant had the burden of proving his contentions by clear and convincing evidence. (People v. Barteau, 10 Cal. App. 3d 483, 486.) In addition, "[t]he granting or denial of a motion by defendant toto withdraw his plea of guilty rests in the sound discretion of the trial judge and his decision will not be disturbed on appeal unless an abuse of that discretion is clearly shown." (People v. Gannaro, 216 Cal. App. 2d 25, 28.) Here, the trial judge held a hearing in which both sides were given an opportunity to argue the motion. In addition, the judge had before him the transcript of the hearing in which defendant entered his guilty plea, defendant's written motion to withdraw his plea, together with defendant's declarations, affidavits, and

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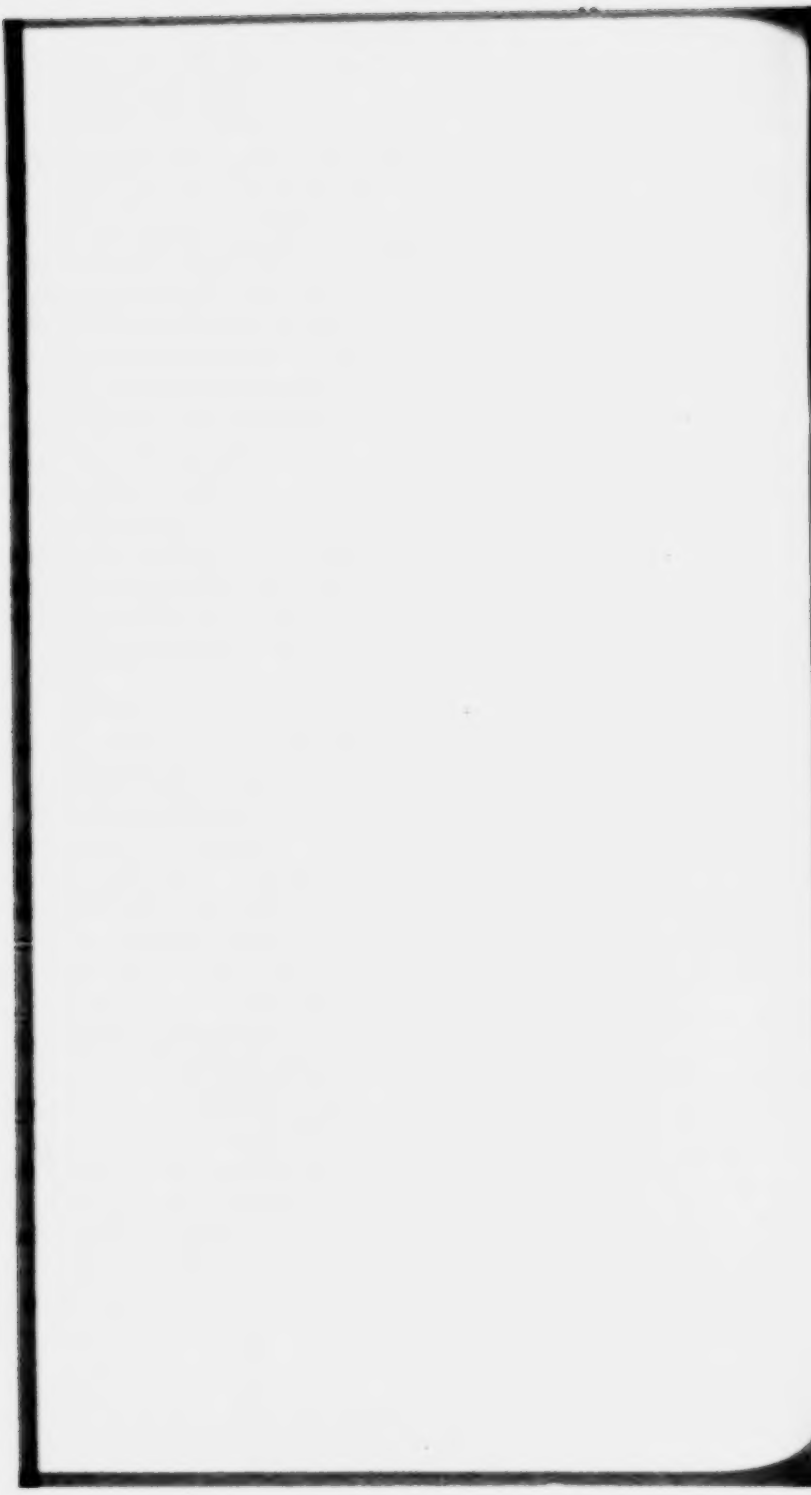
1/ People v. Barteau, 10 Cal. App. 3d 493, 486 held: "Where a guilty plea is entered as a result of plea bargaining, and . . . where the state has failed to perform its part of the bargain, then the trial court may allow a plea withdrawal."

People v. Brotherton, 239 Cal. App. 2d 195, 200 held: "[A] plea of guilty may be withdrawn . . . by reason of mistake, ignorance, inadvertence or any factor that overcame the defendant's exercise of a free judgment."

In re Williams, 1 Cal. 3d 168, 175 held: "Deprivation of the right to counsel at the pleading stage because of incompetency can constitute a deprivation of due process."

points and authorities; the judge also had before him the district attorney's declarations, together with his points and authorities in opposition to the motion. In brief, the evidence presented on behalf of defendant tended to support each of his first three contentions, and the evidence presented on behalf of the district attorney tended to refute each of defendant's first three contentions. The judge weighed the evidence and denied the motion. On appeal, defendant seeks, in effect, to reargue the issue and asks the appellate court to reweigh the evidence. Defendant's burden on appeal is to show that the trial judge "clearly abused his discretion," and that burden has not been met. We have reviewed the record and find ample evidence to uphold the trial court's decision.

Defendant's fourth contention is that the judge who accepted his guilty plea improperly failed to determine whether defendant was making his plea "voluntarily and knowingly." Specifically, defendant relies upon Boykin v. Alabama, 395 U.S. 238 for authority that it is a violation of "the due process clause of the Fourteenth Amendment to accept a guilty plea where the record did not contain 'an affirmative showing that it was intelligent and voluntary.'" Defendant, however, concedes that the California Supreme Court, in In re Tahl, 1 Cal.3d 122, has ruled that Boykin is not to be applied retroactively. Therefore, if Tahl is controlling in this case, since defendant pleaded guilty before the time that Boykin was decided, then Boykin would not apply. Defendant contends, though, that "Tahl's holding of non-retroactivity is not controlling in . . . the case



at bar" because "Tahl is is factually distinguishable." Whether this case may be legally distinguished from Tahl is unnecessary for us to decide for, even if we apply the stricter test of Boykin, no error was committed. At the time that defendant renewed his motion to withdraw his plea, the trial judge stated: "I will concede that at the time that the plea was taken . . . the words used at that time are not consistent with the words of art that the Supreme Court now says that the court must utilize in taking the plea. But . . . I believe defendant knowingly and intelligently and voluntarily entered a plea to that charge, because I think that he knew, in fact, he was guilty of grand theft at the time he entered the plea."2/ Whether required

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2/ The reporter's transcript reflects the following examination by the deputy district attorney (Rhodes) and answers by defendant immediately preceding the trial court's acceptance of defendant's plea of "guilty":

> "MR. RHODES: Your attorney, Mr. Lambros, has indicated to the Court and to the District Attorney's office that you wish to waive your right to a preliminary hearing and trial, and plead guilty to Count one of Complaint Number 238384 which alleges Grand Theft, a violation of 483.1 of the Penal Code, on or about the 4th day of January, 1966. Is all that information correct?

[Continued]

to do so at that time (before Boykin) or not, the judge, in denying defendant's motion, did apply the "knowingly and voluntarily" test which

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2/ [Continued]

"THE DEFENDANT: Yes, it is.

"MR. RHODES: Do you understand the nature of the charge against you, that it is a felony?

"THE DEFENDANT: Yes, I do.

"MR. RHODES: Have you discussed this charge and the facts of this case with your attorney, Mr. Lambros?

"THE DEFENDANT: Yes, I have.

"MR. RHODES: Are you pleading guilty freely and voluntarily without threat or fear to yourself or to anyone closely related to you or associated with you?

"THE DEFENDANT: Yes, I am.

"MR. RHODES: Has anybody made any promises of a lesser sentence, probation, reward, immunity or anything else in order to induce you to plead guilty?

"THE DEFENDANT: No, they haven't.

"MR. RHODES: Do you understand that probation, if any, and sentencing, will be determined solely by the judge in the Superior Court?

"THE DEFENDANT: Yes, I do.

"MR. RHODES: . . . You are pleading guilty because in truth and in fact you are guilty, and for no other reason, is that correct?

"THE DEFENDANT: That's correct.

[Continued]

defendant advocates. On appeal, defendant's burden is to prove that the trial court's decision

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2/ [Continued]

"MR. RHODES: Are you also pleading guilty because you personally feel you are guilty of Count One in that certain complaint number 238384?

"THE DEFENDANT: That is correct.

"MR. RHODES: Do you waive further reading of the complaint and are you now ready to plead?

"THE DEFENDANT: Yes, I am.

"MR. RHODES: In complaint number 238384, Mr. Zemliak, you are charged with Grand Theft in violation of 487.1 of the Penal Code in that on or about the 4th day of January, 1966, you did wilfully and unlawfully and feloniously take property that is money, in excess of two hundred dollars, to wit: ten thousand dollars, of the personal property of Eugene S. Firestone.

"To this particular charge, how do you plead, guilty or not guilty?

"THE DEFENDANT: Guilty."

represents a "clear abuse of discretion," and defendant has not met that burden.

The judgment is affirmed.

CERTIFIED FOR NONPUBLICATION.

STEPHENS, J.

We concur:

KAUS, P. J.

REPPY, J.

APPENDIX B

CLERK'S OFFICE SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JAN 19 1972

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 2 Crim. *No.* 17226

People

vs.

Zemliak

Respectfully,

G. E. BISHEL
Clerk

APPENDIX C

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

2d Crim. No. 21495
Superior Court
No. A 238384
Court of Appeal - Second Di
F I L E D
Mar 15, 1972
Clay Robbins, Jr., Clerk

In re)
)
CHARLES ZEMLIAK)
)
on)
)
HABEAS CORPUS.)
)

THE COURT:

TO: PETER J. PITCHESS,
Sheriff of County of Los
Angeles, Respondent:

Upon reading the petition for a writ of habeas corpus and for recall of the remittitur filed by CHARLES ZEMLIAK, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. That the motion to recall the remittitur is denied.

2. That respondent show cause why a writ of habeas corpus should not issue as prayed in said petition, before Honorable James G. Kolts, Supervising Judge, Department 100, of the Superior Court of the State of California, for the County of Los Angeles, on a day to be fixed by said court.

3. All other relief prayed for in said petition is considered incidental to the petition for a writ of habeas corpus and is denied in this court, without prejudice to a renewed application to the said Honorable James G. Kolts.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1634

CHARLES ZEMLIAK,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Supreme Court

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

Petitioner seeks a writ of certiorari from this Court to the California Supreme Court to review its decision denying a hearing to petitioner and in effect validating the affirmance of petitioner's conviction for grand theft by the California Court of Appeal. The order of the California Supreme Court denying a hearing was filed on January 19, 1972, and a copy thereof is attached to the Petition as Appendix B. The opinion of the California Court of Appeal was filed on November 24, 1971 (*People v. Zemliak*, 2d Crim. No. 17226), and a copy of the opinion is attached to the Petition as Appendix A. It also appears that petitioner is additionally seeking a writ of certiorari from this

Court to review the denial of his petition for habeas corpus by the Superior Court of the State of California for the County of Los Angeles on April 27, 1972. (Pet. p. 7.)

Jurisdiction

Jurisdiction in the Petition is invoked pursuant to Title 28, United States Code, section 1257.

Questions Presented

The Petition, while not using an interrogatory form, contains affirmative arguments which, it is hoped, may fairly be summarized as raising the following questions:

1. Was petitioner entitled to be released from his plea bargain because the prosecution breached promises relied on by petitioner in entering his guilty plea?

2. Was petitioner entitled to release from the plea bargain on the basis of mistake, in that petitioner's counsel had led him to believe that certain promises as to probation had been made by the District Attorney's office?

3. Was petitioner entitled to be released from his plea bargain due to ineffective assistance of counsel, consisting of counsel's failure to adequately investigate the underlying facts of the offense and failure to sufficiently confer with petitioner?

4. Should the principles enunciated in *Boykin v. Alabama*, 395 U.S. 238 (1969), be retroactively applied?

Statement of the Case

By a complaint filed in the California Municipal Court for the County of Los Angeles, petitioner was charged with grand theft in violation of section 487, subdivision 1, of the California Penal Code. Petitioner pleaded guilty to this charge and all other counts charged in the complaint were dismissed on motion of the People of the State of California. [Cl. Tr. p. 1.][1]

Petitioner filed a written motion to withdraw his plea of guilty, supported by declarations by himself and defense counsel and supported by additional affidavits and written points and authorities. [Cl. Tr. pp. 6-30.] The prosecution filed a declaration and affidavit in opposition to appellant's motion to withdraw his guilty plea and supported this by written points and authorities. [Cl. Tr. pp. 32-43.] Petitioner's motion to withdraw his plea of guilty was argued and denied. [Cl. Tr. p. 45.]

An extensive hearing was held at the time set for the determination of the issue of probation and sentence, and petitioner's renewed motion to withdraw his guilty plea and his motion to have the matter transferred back to the Municipal Court was denied. Probation was denied, and petitioner was sentenced to the California State Prison for the term prescribed by law. [Cl. Tr. pp. 46, 55.]

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[1]The clerk's transcript, as well as the reporter's transcript of this proceeding will be submitted by respondent upon request of the Court.

Petitioner appealed to the California Court of Appeal, which on November 24, 1971, after considering substantially the same contentions as petitioner now raises, affirmed the conviction. (Pet., App. A.) Petitioner then filed a petition for hearing in the California Supreme Court, which was denied on January 19, 1972. (Pet., App. B.)

Thereafter petitioner filed with this Court an Application for Bail and Stay Pending Filing of Petition for Certiorari (Case No. A-833), which was informally denied. Petitioner, though telegrams, submitted additional material to this Court, and Mr. Justice Douglas issued an order (Case No. A-833) on March 3, 1972, stating that subsequent to this Court's denial of petitioner's application for bail new facts had come to light suggesting a substantial claim under the recent decision in *Santobello v. New York*, 404 U.S. 257 (1971). The order denied petitioner's reapplication for bail, but suggested an evidentiary inquiry before another tribunal. (Pet. pp. 5-6.)

Petitioner, on or about March 13, 1972, then filed an application for habeas corpus in the California Court of Appeal, Second Appellate District, Division Five, asking for various relief, including an evidentiary hearing as suggested by Mr. Justice Douglas. On March 15, 1972, the California Court of Appeal issued an Order to Show Cause returnable in the Superior Court of the State of California for the County of Los Angeles, in effect ordering the prosecution to show cause

why the relief prayed for in the habeas corpus petition should not be granted. (Pet., App. C.)

After holding an extensive evidentiary hearing, the Superior Court discharged the order to show cause and denied the petition for habeas corpus on April 27, 1972. [C.T.H.S. p. 43; R.T.H.C. pp. 291-307.[2]]

Petitioner contends, and respondent agrees, that he thereafter filed a notice of appeal from the April 27, 1972, Superior Court ruling and that such an "appeal" is now pending before the California Court of Appeal.[3] [C.T.H.C. p. 44; Pet. p. 7.]

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[2]The designation "C.T.H.C." refers to the clerk's transcript of the habeas corpus evidentiary hearing held by the Superior Court pursuant to the Order to Show Cause of the California Court of Appeal. "R.T.H.C." refers to the reporter's transcript of that hearing. Copies of these transcripts will be supplied to the Court upon request.

[3]By his own admission, petitioner is not only attempting to secure relief from this Court from a matter still pending before the California state courts, and is thus not entitled to consideration by the Federal Courts as to that matter [*e.g., Lynch v. Field*, 415 F.2d 766 (9th Cir. 1969)], but he is not even properly before the California Court of Appeal as under state law there is no "appeal" from the denial of a petition for habeas corpus by a trial court. Cal. Pen. Code § 1506; *People v. Brotherton*, 236 Cal. App. 2d 195, 199, 48 Cal. Rptr. 513, 516 (1966). To obtain appellate habeas corpus relief petitioner must simply file an original writ proceeding in the state appellate court.

ARGUMENT

I

The Issue of Whether or Not the Prosecution Breached Its Portion of the Plea Bargain Has Been Factually Resolved Against Petitioner in Two Separate State Court Proceedings by Triers of Fact Using Proper Constitutional Standards, and There Is No Reason Why This Court Should Reach a Different Conclusion as to This Essentially Factual Issue

Relying on the recent decision of this Court in *Santobello v. New York*, 404 U.S. 257 (1971), petitioner in essence contends that he should be released from his plea bargain because the prosecution breached its promise to be neutral on the matter of probation with respect to communications to the Probation Department and recommendations to the sentencing Judge. (Pet. pp. 3-8.) Petitioner correctly notes that he presented evidence, prior to his first appeal in the California appellate courts, to the effect petitioner, in entering his plea of guilty, relied upon promises by the prosecution that the District Attorney's office would be neutral on the issue of probation and the investigation into petitioner's activities would not be continued; that the District Attorney's office did pursue the investigation and submit additional reports to the Probation Department; that the District Attorney's office stated that it would neither recommend nor oppose probation; and that at the time set for the matter of probation and sentence, the prosecution expressly requested that probation be denied and petitioner be sentenced to the California State Prison. (Pet. pp. 3-5.)

It is respondent's position the question of whether or not there was a breach of any promise upon which

petitioner relied in entering the plea bargain was essentially a question of fact, which was properly resolved against him in two separate California evidentiary hearings.

At the probation and sentence hearing, the court reviewed extensive evidence presented by both sides. The prosecution mainly presented evidence in the form of declarations, and the defense presented both testimonial and documentary evidence. Petitioner raised basically the same evidentiary assertions as are summarized in the petition. However, in response to petitioner's factual claims, the Los Angeles County Deputy District Attorney who handled the matter for the prosecution, George H. Rhodes, effectively countered by way of declaration that while he did state the "District Attorney's office would not interfere in the work of the Probation Department nor make any comments to the Probation Officer regarding any aspects of the case to sway the Probation Department or to help them make any decision in the particular matter at any time," Mr. Rhodes also indicated to defense counsel, Mr. Lambros, that "at the appropriate time in the Superior Court at the time of sentencing that [Mr. Rhodes] would make comments to the Court indicating that this was a 'state prison' type case and that [petitioner] stole somewhere between three and five million dollars in this particular matter. . . ." [Declaration of Deputy District Attorney George Rhodes, Cl. Tr. pp. 36-37.]

Mr. Rhodes' statement that he would indicate to the court that "this was a 'state prison' type case" clearly evidenced his intent to request that probation be denied and that petitioner be sentenced to the state prison. [Rep. Tr. p. 686.]

Respondent respectfully emphasizes that this evidentiary hearing was extensive. Petitioner called ten witnesses, and the matter was heard on nine separate court days. [Rep. Tr. *passim.*] Additionally, the Superior Court Judge had before him numerous items of documentary evidence filed by both parties. [Cl. Tr. *passim.*] The situation may be best summarized in the words of Justice Stephens of the California Court of Appeal:

> "In brief, the evidence presented on behalf of [petitioner] tended to support each of his first three contentions, and the evidence presented on behalf of the District Attorney tended to refute each of defendant's first three contentions. The Judge weighed the evidence and denied the motion." (Pet., App. A-4.)

The question thus becomes whether this Court should take it upon itself to reweigh the evidence, assess the relative credibility of witnesses, and resolve conflicting factual claims.

Respondent acknowledges that this Court has previously established that when a claim of constitutionally protected rights is involved it remains the duty of the Court to make an independent examination of the whole record. *Bachellar v. Maryland,* 397 U.S. 564, 566 (1970). However, while state court findings of fact are not binding on this Court, they are to be accorded great weight. *Michel v. Louisiana,* 350 U.S. 91, 96 (1955). Respondent respectfully requests that this Court accept the factual findings of the state courts in this case since there is nothing to indicate the merits of the factual dispute were not fully and fairly resolved in either of the evidentiary hearings conducted in the

instant matter. *Cf. Townsend v. Sain*, 372 U.S. 293, 313 (1963).

Indeed, respondent would respectfully take the liberty of suggesting that Mr. Justice Douglas has already expressed a view in accord with respondent's position, stating in his order March 3, 1972 (Case No. A-833) denying petitioner's reapplication for bail that "the substantiality of the petitioner's application appears to depend upon an evidentiary inquiry, more appropriately taken by another tribunal . . . ." [C.T.H.C. p. 24; Pet. p. 6.][4]

Petitioner, however, alludes to *Santobello v. New York*, 404 U.S. 257 (1971), a decision of this Court filed after the decision of the California Court of Appeal in the instant case, which held that the defendant was entitled to relief from his plea bargain because the prosecution had broken its promise to make no recommendation as to sentence. *Santobello* does pe-

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[4]Respondent would in addition respectfully submit that its interpretation of Mr. Justice Douglas' sentiments is consistent with the following passage from a decision of this Court, which, though since overruled and questioned on other points, contains a yet viable statement on Federal Court jurisdiction of state criminal matters:

> "Primary, and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.
>
> "A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect. [Citations]" *Stein v. New York*, 346 U.S. 156, 181-182 (1953).

titioner no benefit for a number of reasons. To begin with, as reflected in part by the opinion of the California Court of Appeal (Pet., App. A-3), California has long recognized that a criminal defendant may be entitled to withdrawal of his guilty plea where the state has failed to perform its part of the plea bargain. *See, e.g., People v. Delles*, 69 Cal. 2d 906, 910-11, 447 P.2d 629, 632, 73 Cal. Rptr. 389, 392 (1968); *People v. Wadkins*, 63 Cal. 2d 110, 114, 403 P.2d 429, 432, 45 Cal. Rptr. 173, 176 (1965); *People v. Barteau*, 10 Cal. App. 3d 483, 486, 89 Cal. Rptr. 139, 141 (1970). Thus, governed by existing California law, the state appellate court and the sentencing judge were operating pursuant to proper constitutional standards which were unaffected by this Court's opinion in *Santobello*.

Additionally, a second evidentiary hearing, held pursuant to the appellate court Order to Show Cause (April 1972), occurred subsequently to *Santobello*[5], and constituted a further (and probably unnecessary) evidentiary evaluation of the factual matters at issue. The judge at this habeas corpus hearing had the benefit of fairly extensive testimony by petitioner and his witnesses on the one hand, and by the Deputy District Attorney who negotiated the plea bargain for the prosecution, the investigator who compiled and supplied the controversial report to the Probation Department, the judge who took the plea, and the Deputy District Attorney's supervisor, as well as voluminous documentary and written material. Again at this second hear-

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[5]Indeed, there were several express references to *Santobello*, both in writing and orally. [*E.g.*, C.T.H.C. pp. 14, 24, 29, 31-33; R.T.H.C. pp. 4, 256-57, 278, 281.]

ing, petitioner presented evidence which, if believed, would have entitled him to much, if not all, of the relief he sought.

However, in accordance with the very purpose of an evidentiary hearing, the prosecution presented evidence which both clarified possible factual doubts and effectively countered petitioner's factual allegations. In essence Mr. Rhodes testified that the plea bargain was reached between himself and Mr. Lambros, petitioner's attorney, before the prosecution had progressed to the stage of seeking a Grand Jury indictment. Though originally planning to charge petitioner with 20 to 25 counts arising out of his business dealings, Mr. Rhodes, after conversing with Mr. Lambros, decided to file a complaint alleging five counts only, to which petitioner was to plead guilty to one count. [R.T.H.C. pp. 24-27.] Mr. Rhodes stated that he would stay neutral and would not interfere with anything the Probation Department desired to do, and would not hold any conferences with the Department. However, Mr. Rhodes also said that he would indicate to the sentencing court that he felt this was a state prison type case because there had been between three and five million dollars misappropriated. [R.T.H.C. pp. 27, 43-45.] Mr. Rhodes did indicate to Mr. Lambros that the investigation would not continue since there was going to be a plea taken and the prosecution was not going to the Grand Jury. Mr. Rhodes believed that Mr. Lambros' disagreement arose from the fact that the investigator, Mr. Pailet, subsequently interviewed or reinterviewed some witnesses. Mr. Rhodes had told Mr. Pailet that the latter should account for the time he and Mr. Rhodes put in the case so that there would be some record in the District Attorney's file as to the entire picture of

what had happened with Guaranty Factors (petitioner's company). Mr. Rhodes in effect stated that the work which was subsequently done, including the witness interviews, was for purposes of refreshing the investigator's memory and for recapitulating and placing in a reportable form the great volume of complex information which the District Attorney's office already had.* [R.T.H.C. pp. 28-29, 45-46, 49-52, 71-72.] The investigator only acted to "recap" old material and did not go out and find new material [R.T.H.C. pp. 71-72]; there were no new items in the report. [R.T.-H.C. pp. 55-56.]

The investigator, Mr. Pailet, testified that his investigation of the case consisted of examining the voluminous books, records, and files of approximately fifteen companies. [Rep. Tr. pp. 108-09.] Mr. Rhodes informed him that there was going to be a plea and that he should write up the work he had done. It took Mr. Pailet approximately four or five weeks to prepare the report, which consisted of 102 pages. He could have written a report four times that large. [R.T. H.C. pp. 109-10, 129.] Mr. Pailet in essence went over the material he had and more or less put down available information on paper. While Mr. Pailet may have contacted certain persons in preparing his report, this

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*Mr. Rhodes explained the inconsistencies between his testimony at the habeas corpus hearing and statements in previous affidavits as the latter being the product of quick assent to statements prepared by other persons and his testimony at the hearing occurring after he had an opportunity to review his notes and the District Attorney's file. [Rep. Tr. pp. 73, 103-05.]

was for purposes of clarification or perhaps to obtain documents which he already knew were in existence but did not possess. Mr. Pailet did not continue the investigation into other matters in relation to the corporation or the transaction involved. [R.T.H.C. pp. 110-11.]

While he was preparing the report, Mr. Pailet was contacted by the Probation Officer, Mr. Coyner, two or three times. Mr. Pailet did not indicate any position on the question of probation. [R.T.H.C. pp. 112-14.] Mr. Pailet would normally write up a comprehensive report so that the office record would reflect the full scope of the allegations and the charges. [R.T.H.C. pp. 126, 191-52.] Mr. Pailet brought a copy of the finished report to Mr. Coyner's office because Mr. Coyner had asked him for it. [R.T.H.C. p. 150.] Mr. Coyner's desire to see Mr. Pailet's report did not affect Mr. Pailet's preparation of the report. [R.T.H.C. p. 162.]

Petitioner's counsel, Mr. Lambros, also took the stand at the hearing and testified as to the circumstances and details of the agreement with Mr. Rhodes. According to Mr. Lambros, they "discussed the termination of further investigation of this matter abruptly, and nothing would continue on, and whatever report was available at that point, whatever there was in the record at that point would go to the Court or to the Probation Department for delivery to the Court. That was all." [R.T.H.C. p. 180.] In other words, it was Mr. Lambros' understanding that only the infor-

mation previously compiled would be transmitted to the Probation Department. [R.T.H.C. p. 182.]

Respondent respectfully submits that the decision on the factual matters announced by the judge at this second evidentiary hearing is entitled to great weight and reflects the findings of a conscientious, knowledgeable, and very able fact finder. The judge, after hearing and assessing the credibility of conflicting witnesses, concluded that there was no breach of any commitment insofar as further investigation of petitioner's activities was concerned. [R.T.H.C. pp. 293-94, 300-01.] The judge, who had apparently dealt with the particular probation officer in the past, went on to observe that what upset the defense strategy was the case being assigned to an exceptionally dedicated and conscientious probation officer who was devoted to the task of presenting a total picture to the court and who wanted to make his own independent judgments on the matter. [R.T.H.C. pp. 299-300.] As to the matter of sentence recommendation, the judge found Mr. Rhodes had stated to Mr. Lambros that this case was a state prison type of case. [R.T.H.C. p. 301.]

As is the situation with the findings at the probation and sentence hearing, there is nothing in the record of the proceedings of the habeas corpus hearing to indicate any reason why the factual determinations of the California courts in the instant matter should not be accepted by this Court. *See Townsend v. Sain, supra,* 372 U.S. 293, 313 (1963); *Michel v. Louisiana, supra,* 350 U.S. 91, 96 (1955).

II

Petitioner's Contention That He Entered His Plea Based Upon Mistake, Ignorance, or Inadvertence Has Been Factually Resolved Against Him in the State Courts, and There Is No Reason Not to Accept the State Evidentiary Determination

Petitioner raises as an additional ground for his release from his plea bargain the assertion that his plea "was based on mistake, ignorance, or inadvertence as to probation, the facts, the factual basis and essential elements of the charge, the defenses thereto and proof requirements." (Pet. pp. 8-9.)

Respondent takes a position similar to that in Argument I above, namely that petitioner has been given at least one factual hearing on this contention in the state courts and that there is no reason for this Court not to accept the resolution of the issue against petitioner. As summarized by the opinion of the California Court of Appeal, petitioner in effect presented evidence in support of his contention and the prosecution countered his contention with its own evidence, and the factual determination was against petitioner. (Pet., App. A-4.)

The state court record of the probation and sentence hearing is supportive of respondent's position herein. Prior to petitioner's plea, Mr. Rhodes had explained the entire case to petitioner's defense counsel, Mr. Lambros. [Cl. Tr. p. 35.] Additionally, Mr. Lambros had represented appellant at all of the meetings of the Creditors' Committee apparently established in ref-

erence to difficulties suffered by petitioner's business which became known, since August of 1966. [Cl. Tr. p. 33.] It was entirely reasonable for the state courts to infer, and is now reasonable for this Court to infer, that Mr. Lambros apprised petitioner of what he had learned at the meetings with Mr. Rhodes and the Creditors' Committee. Appellant's basic awareness of the essential nature of the charges against him may be seen by the fact that on September 5, 1968, after having been admonished of his constitutional rights, petitioner had a conversation with an investigator from the Los Angeles County District Attorney's office in which he stated he knew his company was in serious trouble in late 1965 and early 1966, that they were looking for money and investors, and that they thereafter accepted investments but without telling the investors that the company was insolvent. [Cl. Tr. pp. 38-41.] Count I of the complaint, the count to which petitioner pleaded guilty, charged that appellant had obtained money from a named investor and that petitioner deliberately failed to inform the investors that Guaranty Factors was insolvent. [Cl. Tr. p. 7.] These facts, taken together, constitute virtually a concrete case to the effect that petitioner was aware of the factual basis and essential elements of the charge to which he pleaded guilty.

When petitioner entered his plea, he stated that he understood the nature of the charge, that he had discussed the charge and the facts of the case with de-

fense counsel, and that he was pleading guilty because he was in fact guilty of Count I.[7] Indeed, at the habeas corpus hearing, the judge who presided over the taking of the plea testified that she believed petitioner when he stated that he entered the plea freely and voluntarily and because he was guilty.[8] [R.T.H.C. p. 80.] Petitioner's in-court and out-of-court statements, taken together, establish that he knew the factual and legal basis as well as the elements of the grand theft charge, the defenses to that charge, and the proof requirements.

Indeed, as the record indicates, the judge who presided at the probation and sentence hearing spent a great deal of time reviewing the matter, and the judge fairly and conscientiously resolved petitioner's factual contention of mistake and ignorance against him. [Rep. Tr. pp. 657-58, 660.]

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[7]This may be verified by reference to pages 4 and 5 of Exhibit A attached to Petitioner's Application to Augment the Record filed in his state appeal from the conviction.

[8]Petitioner, it may be noted, was not without experience with the criminal law process. It appears that he had been involved in a matter in Seattle in 1948 when $10,000 was allegedly obtained by false pretenses, but, by petitioner's own statement, he was able to obtain the friendship of an assistant district attorney and plead guilty in exchange for probation and restitution. [R.T.H.C. p. 298.]

III

Petitioner's Plea Was Not the Result of Ineffective or Unprepared Counsel

Petitioner contends that he should be entitled to relief from his plea bargain because of the inability or failure of his counsel to investigate the facts underlying the charge and the defenses thereto, and his failure to confer with his client with regard to the facts, defenses, and proof requirements of the charged offense. (Pet. pp. 10-11.)

With respect to the portion of petitioner's contention alleging he was not conferred with regarding facts and defenses relating to the crime charged, respondent respectfully submits that this contention has in large part been answered by the showing of petitioner's awareness of the matters involved in Argument II above. To the extent that this has not been shown, respondent again would rely on the state court factual determination that counsel was not inadequate. (*See* Pet., App. A-4.)

Respondent would first note that the test regarding ineffective counsel used in California is essentially the same as that used by the federal courts. Compare *In re Saunders*, 2 Cal. 3d 1033, 1041-42, 472 P.2d 921, 926, 88 Cal. Rptr. 633, 638 (1970), and *People v. Ibarra*, 60 Cal. 2d 460, 464-65, 386 P.2d 487, 490, 34 Cal. Rptr. 863, 866 (1963) with *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970), and *Bruner v. United States*, 432 F.2d 931, 933 (10th Cir. 1970). Two trial level state courts and one state appellate court have all, using the California standard, rejected appellant's contention of ineffective counsel.

As indicated above, Mr. Lambros was present at all the creditors' meetings relating to Guaranty Factors, and received an explanation of the case prior to petitioner's guilty plea. [Cl. Tr. p. 35.] The facts that petitioner, as shown above, understood the nature of the charge, that he had discussed the charge and the facts of the case with Mr. Lambros prior to pleading guilty, and that Mr. Lambros indicated to Mr. Rhodes that petitioner desired to plead guilty to one count of grand theft [Cl. Tr. p. 35], tend to show adequate preparation and discussion of the case by Mr. Lambros. Counsel for petitioner, at the probation and sentence hearing, advanced the claim of his own ineffectiveness, asserting a lack of opportunity to review the voluminous files involved, stating that he had "shunned" his responsibility to petitioner under the circumstances, and expressing his feeling that "maybe I shouldn't have allowed it [the guilty plea]." [Rep. Tr. 647, 656.] However, no doubt noting that the law does not demand retrospective perfection of defense counsel, merely that his advice be within the range of competence expected of criminal trial attorneys [*McMann v. Richardson*, 397 U.S. 759, 771 (1970)], the Superior Court Judge denied the petition.

While perhaps not dealing with precisely the same issue, the judge at the habeas corpus hearing came to a similar conclusion. Among the important observations by the judge were the following: Mr. Lambros was undoubtedly aware that petitioner's damaging admission to the District Attorney's investigator was virtually a confession to theft by false pretenses. [R.T. H.C. pp. 296-97]; Mr. Lambros was familiar with the business activities of petitioner because he had been representing him for some time in petitioner's efforts

to secure additional financing [R.T.H.C. p. 286]; Mr. Lambros thought he could present a situation to the judge where petitioner was on the streets and his creditors wanted him to remain there in order to retrieve their money [R.T.H.C. p. 298]; since petitioner was articulate, had a fine family, and was a good salesman, it was no doubt hoped petitioner could charm the probation officer into a favorable report [R.T.H.C. pp. 298-99]; under the circumstances, entering the plea bargain was the sensible thing to do and petitioner's plans went awry only because an exceptionally independent, dedicated, and conscientious probation officer was appointed to his case. [R.T.H.C. pp. 299-399.] The court further observed that it had apparently been petitioner's strategy to establish that Mr. Lambros "was sort of an inept, congenial bumbler . . . and misled [petitioner] into pleading guilty without an awareness of what he was doing or what was happening or what was involved." The judge expressly rejected this implication. [R.T.H.C. pp. 294-95.]

The evidentiary bearing judges in this case, especially the habeas corpus judge, had the unique opportunity to personally observe the witnesses, including Mr. Lambros. It was perhaps due to factors such as this that this Court has observed that the question of competence of trial counsel is largely one for trial courts. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

Before closing, respondent must respectfully note it is most peculiar indeed that a criminal defendant would allege in his state court appeal (as is also the situation in the instant petition) that his counsel was incompetent or ineffective, but nevertheless continue to retain that same attorney as co-counsel during attempts for post-conviction relief.

IV

Boykin v. Alabama Should Not Be Retroactively Applied

In what clearly is petitioner's contention of most potential legal significance, his last claim is to the effect the principles of *Boykin v. Alabama*, 395 U.S. 238 (1969), should be retroactively applied to his case, and that so applied those principles render his plea in the instant case involuntary and unknowing.[9] (Pet. pp. 12-13.)

Respondent concedes that the specific inquiries required by *Boykin* were not made in the instant case, inasmuch as the guilty plea herein preceded the *Boykin* decision. Respondent respectfully submits, however, that the guilty plea herein was a voluntary act and hence passes constitutional muster. *See, e.g., Machibroda v. United States*, 368 U.S. 487, 493 (1962); *United States ex rel. Sanders v. Maroney*, 438 F.2d 1185, 1186 (3rd Cir. 1971). That the plea was voluntary was the conclusion of both of the judges who presided at the state evidentiary hearings in the instant case and of the California Court of Appeal, whose opinion contains an excerpt from the Reporter's Transcript of the guilty plea. (*See* Pet., App. A-5.)[10] In-

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[9]Petitioner uses language to the effect that even if *Boykin* is deemed not to be retroactive, the principles announced in that case should nevertheless be controlling in the instant case. This seems to be nothing more than a statement that even if *Boykin* is not retroactive, it really should be, or, in other words, petitioner is indirectly contending that *Boykin v. Alabama* should be retroactively applied.

[10]The Judge who took petitioner's plea testified at the habeas corpus hearing that she believed the plea was entered freely and voluntarily. [R.T.H.C. p. 80.]

deed, petitioner articulates no recognizable contention that his plea might be considered other than knowing and understanding under pre-*Boykin* standards.

The question then remaining is whether or not the *Boykin* decision should be given retroactive effect. Respondent respectfully submits that it should not. This Court, based on Rule 11 of the Federal Rules of Criminal Procedure, announced requirements in the taking of pleas in Federal Courts similar to the requirements of *Boykin*. *McCarthy v. United States*, 394 U.S. 459 (1969). In *Halliday v. United States*, 394 U.S. 831, 832-33 (1969), the Court determined that the requirements of *McCarthy* and Rule 11 should not be applied retroactively. Based upon the readily apparent analogy between the *McCarthy* situation and the *Boykin* situation, a number of courts have similarly determined that the requirements of *Boykin* should not be retroactively applied. *E.g.*, *United States ex rel. Sanders v. Maroney*, 438 F.2d 1185, 1186 (3rd Cir. 1971); *Benn v. Eyman*, 436 F.2d 1074, 1075 (9th Cir. 1971); *United States ex rel. Rogers v. Adams*, 435 F.2d 1372, 1374-75 (2d Cir. 1970), *cert. denied*, 404 U.S. 834 (1971); *In re Tahl*, 1 Cal. 3d 122, 135, 460 P.2d 449, 498, 81 Cal. Rptr. 577, 586 (1969), *cert. denied*, 398 U.S. 911 (1970); *cf. Johnson v. New Jersey*, 384 U.S. 719, 721, 734 (1966).

Respondent respectfully submits that there is no reason why state court guilty pleas should be treated differently than Federal Court guilty pleas and that, accordingly, *Boykin* should not be retroactively applied.

Conclusion

For the reasons expressed above the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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